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The Chagos Islands: dialogue between super partes courts and "perhaps" not yet a final solution to a historical dispute

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Abstract: This work seeks to highlight a troubled path of a dispute in the law of the sea through a delimitation of the Chagos Islands and the states involved, that continues in various inter partes courts until now. It is a complex and delicate dispute given the territoriality of the area, that is regulated according to the law of the sea and the positions of states such as Mauritius and the United Kingdom, follow different arguments with the victims being the people, who were deported. The dispute has followed a path at the European Court of Human Rights, at the International Court of Justice, at the English courts and at the special chamber of the International Tribunal for the Law of the Sea with approximately the same arguments but with a solution that is not yet feasible given that the situation is not yet concluded and the arguments at stake are various. A political but above all legal approach is needed to close the still open matter. A dialogue also between Courts is important in the international

community.

Keywords: law of the sea; UNCLOS; international dispute; ECHR; ECtHR; ICJ; ITLOS special chamber; Chagos Islands; Mauritius; United Kingdom; dialogue between courts; decolonization between states; territorial sovereignty; international law; law of the sea; legal status of archipelago; jurisdictional sovereignty; Exclusive Economic Zone (EEZ); UNCLOS arbitration; principle of self-determination; continental shelf; monetary gold principle.

Introduction

The legal status of the Chagos Islands archipelago (Liakopoulos, 2020b; Eicherger, 2021; Gaver, 2021; Guifoyle, 2021; Roeben, 2021; Thin, 2021; Liakopoulos, 2021; Naldi, 2021) is a topic that is being addressed by various international tribunals. We are investigating a preliminary ruling of the International Tribunal for the Law of the Sea (ITLOS) regarding the delimitation of the maritime border between the Maldives and Mauritius in the Indian Ocean of 28 January 2021 (see photo n.1)[1]. It was Mauritius that asked not to be recognized but qualified as a coastal state that is located near the Chagos Islands that from a

1https://www.itlos.org/en/main/cases/list-of-cases/dispute-concerning-delimitation-of-the-maritime-boundary-between-Mauritius-and-Maldives-in-the-indian-ocean-Mauritius/Maldives/

legal point of view are under British administration, i.e. in the British Indian Ocean Territory-BIOT[2].

In the first judgment just cited, the special chamber of the ITLOS rejected all the exceptions that are requested by the Maldives side regarding the jurisdiction, admissibility of claims proposed by Mauritius itself.

The control, screening of the positions presented regarding the jurisdiction and the questions respect Art. 76 of the UNCLOS[3] (Pröelss, 2017) regarding the continental shelf, as well as the determination of the jurisdiction, for the claims of Mauritius, which concerns the obligations of a provisional nature so as not to prejudice the final result, that is, the solution of the dispute regarding a delimitation that concerns the exclusive economic zone, the continental shelf between states and adjacent states according to Art. 74, par. 3 and 84, par. 3 UNCLOS (Pröelss, 2017). Furthermore, these are the points that are part of the positions and the arguments put forward by the parties themselves.

Specifically, the consultative jurisdiction of the ICJ has shown that there are collective interests that are part of the non-binding nature of the opinions. The value that ascertains situations of illicit acts committed against the international community does

2https://www.biot.gov.io/

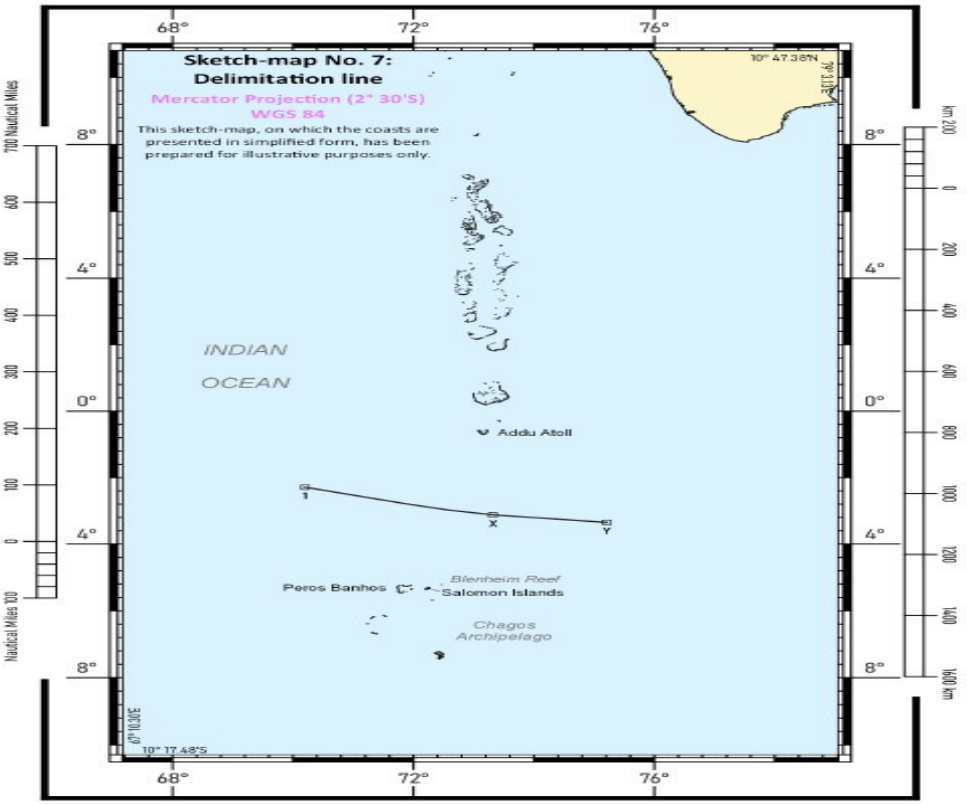
3United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3 (entered into force 16 November 1994) (UNCLOS).

not measure and does not limit legal effects that are taken into consideration by any super partes tribunal.

Sentences of ascertainment in a dispute that always concern violations of erga omnes obligations in a consultative forum reflect the state of international law and the law of the sea in our case, with a susceptible way before state actions, as well as, the objectives of impartiality, competence, development of an activity ultimately self-interpretative based on international law, that is, a legal situation with characteristics that produce erga omnes effects for the international community.

Even the obligations of loyal cooperation between states that are in a dispute call into question the higher interests of the international community due to the lack of deficits often of an international system and this because they function in a political and less legal way and without putting the collective interest in the forefront. The mass interest respects the obligations of the principles of the UN, the exercise of competences, as well as the private interest of the state as a party to the dispute that does not directly affect an international court and the legal situation of the dispute.

Map 1:Delimitation line in Chagos Arhipelago



Source: ICJ

The judgment is the result of an opinion that was adopted by the International Court of Justice (ICJ), on 25 February 2019, regarding the legal consequences of the separation of the Chagos Islands from Mauritius in 1965 (Liakopoulos, 2020a)[4]. The opinion from another super partes body is the decisive result of a statement that finds space in the chamber that examined the questions submitted to it.

The judgment offers food for thought given that it is perhaps the first time a dialogue between a super partes court, not like those we know so far in the European context but between ICJ and ITLOS. A dialogue that was also taken into consideration by the General Assembly with the related Resolution n. 73/295 of 22 May 2019[5], which actually integrated what the ICJ predicted.

The argument is based on some exceptions requested from Maldives and the relative reconstruction from a legal but also historical point of view. The decision of the preliminary chamber confirmed the conditions of activity of the political organs of the UN, as a collective management, that responds to the illicit acts that undermine the values of the international community, and as a deficit in the international legal system

4ICJ, Opinion of 25 February 2019 in the case of the legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965, I.C.J. Reports, 2019, pp. 95ss.

5https://digitallibrary.un.org/record/3806313?v=pdf; https://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_313_EN.pdf

(Liakopoulos, 2020b)[6].

This is a decisive position that we also found in the principle of monetary gold. It is an important rule of liability brought by a third party (Liakopoulos, 2020a)[7]. It is also a principle of international jurisprudence[8] that has to do with the political and legal nature leaving out the relative uncertainties of the definition (Orakhelashvili, 2011), which allows the state to be indispensable due to the absence of a procedure. Moreover, the acceptance of jurisdiction has to do with the possibility that is offered to the judge in trying to resolve the dispute and to submit legal interests of the state according to the request of the decision[9].

Of course, the general need for corrections for the application of principles and interests involved, which are not bilateral in nature, ends with the protection offered in court of the values of

6See in argument the Seventh Report on State Responsibility, in Yearbook of the International Law Commission, 1995, vol. II, part one, p. 3ss, especially par. 103, 107: "(...) the option of using the advisory function of the Court, although taken into consideration (...) was ultimately discarded in favour of the contentious function, mainly due to the need to ensure adversarial proceedings between the parties and the most thorough as possible investigation of the facts in question (...) it was admitted that (...) one may consider the ICJ pronouncements as essentially equivalent in authority, regardless of whether they are labelled advisory opinion or judgment (...)".

7ICJ, judgment of 15 June 1954 in the case of the monetary gold taken at Rome in 1943 (Italy v. France, the United Kingdom and the United States), I.C.J. Reports, 1954, p. 32.

8See the case from the Permanent Court of Arbitration of 5 February 2001: Larsen v. Hawaiian Kingdom,: https://pca-cpa.org/en/cases/35/, 566ss, paragrafi 11.8-11.24. See also another special chamber has excluded preliminary exceptions in case: Decision on the "Prosecution request pursuant to article 19(3) for a ruling on the Court's territorial jurisdiction in Palestine"), ICC-01/18-143, par. 59.

9ICJ, Certain phosphate lands in Nauru (Nauru v. Australia), preliminary objections, judgment ICJ Reports 1992, p. 261, par. 55.

an international community involved in a unitary manner. The judgment followed the requests made, as a solution that accepted them and decided above.

The past of the Chagos Islands

The Chagos Islands were a British colony. In 1914 the territory of Mauritius which is part of the archipelago was released by France to the Great Britain and from 1965 to the British administration. In 1965 negotiations between Great Britain and Mauritius were concluded with a final agreement of 23 September 1965, the so-called Lancaster House agreement. With this agreement the Great Britain accepted and granted the independence of Mauritius and its separation from the Chagos Islands. Mauritius remained under the administration of the islands. Also a military base was created in the large island Diego Garcìa under the management of the United States (Oraison, 2018).

The British government recognized Mauritius' exploitation of the sea and strategic interests in the area, thus justifying its independence[10]. In the same year, Mauritius was included in the family of the UN.

10Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ, Request for an Advisory Opinion) Written Statement of the African Union (1 March 2018) paras 69, 217; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (ICJ, Request for an Advisory Opinion), Written Statement submitted by the Government of the Republic of South Africa (1 March 2018) parr. 6, 60, 63, 88.

On 8 November 1965, the United Kingdom created the British Indian Ocean Territory, which included the Chagos Archipelago, the Aldabra Islands, the Roches Islands and Farquhar. They were under the administration of the Seychelles. The General Assembly of the UN invited and led to the conduct of a definitive dismemberment of Mauritius, violating thus its territorial integrity[11]. Between 1967 and 1973, more than two thousand citizens from the archipelago of Mauritius were deported to the Seychelles (Rousseau, 1966), where they still do not have the right to return to their territory (Alexandre, Koutouki, 2018)[12]. A complicated situation has thus arisen[13]. A dispute that has also been heard by the English courts. Citizens of the Chagos Islands have turned to them due to deportation and the refusal by the British authorities to resettle them in their

11 See for example the: General Assembly Resolution 2066 (XX) of 16 December 1965, entitled "Question of Mauritius", in particular paragraph 4, which is affirmed that: "(…) with deep concern (…) any step taken by the administering Power to detach certain islands from the Territory of Mauritius for the purpose of establishing a military base (...) would constitute a violation of Resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples) (…)". Resolution 2232 (XXI) of 19 December 1967, in which the Assembly affirmed the incompatibility with the purposes and principles of the Charter and with Resolution 1514 (XV) of "(…) any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of colonial Territories and the establishment of military bases and installations in these Territories (…)".

12 L'Order of 10 June 2004 (British Indian Ocean Territory (Constitution)), which in art. 9 affirmed that: "(…) the Territory was constituted and is set aside to be available for the defence purposes of the Government of the United Kingdom and the Government of the United States of America, no person has the right of abode in the Territory (…) 2. Accordingly, no person is entitled to enter or be present in the Territory except as authorised by or under this Order or any other law for the time being in force in the Territory (…)".

13 See for the history of the controversy from the UN Doc. A/35/PV.30, 9 October 1980, par. 40.

archipelago (Gifford, 2018; Monaghan, 2021)[14].

We have a judgment from the European Court of Human Rights (ECtHR) in 2012 on the issue at hand. In it, the citizens of the Chagos Islands complained about their forced removal from the archipelago, i.e. a violation of the ECHR and especially of Art. 8 and Art. 1 of the first additional protocol (Monaghan, 2013; Jones, 2019; Villiger, 2023)[15]. The ECtHR recognized the inadmissibility of the appeal for the citizens of the Chagos Islands, referring only to a "shameful treatment"[16].

The decision was based on article 34, considering them victims. Furthermore, the related outcome of the civil proceedings in the English courts was an argument that opened the way for the United Kingdom to use the claims of a proceeding as well as the related jurisdictional remedies. The court expressed its jurisdiction ratione loci, as a circumstance that the United Kingdom did not pay due respect to the Chagos Islands. It also used Art. 56 ECHR (Villiger, 2023), as a colonial clause that extended the application of the ECHR also to overseas

14See the decision of 30 July 2020 of the Court of Appeal (Civil division) in R (Hoareau and Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs where it affirmed the decision of 8 February 2019 and which dismissed the appeal from Solange Hoareau and Louis Olivier Bancoult concerning the quashing of the decision of 16 November 2016 where the British Government refused to allow the people of the Chagos Islands to return to their territory in the Indian Ocean. The Supreme Court il 13 December 2021 refused permission to appeal: www.supremecourt.uk/news/permission-to-appeal-december-2021.html

15ECtHR, 11 December 2012, Chagos Islanders v. United Kingdom case n. 35622/04.

16ECtHR, 11 December 2012, Chagos Islanders v. United Kingdom, op. cit., par. 83.

territories, thus protecting the relevant international relations (Milanovic, 2013)[17].

The English courts did not make use of the argument presented to the ECtHR, but did manage to double-fault the attempt to challenge the lawfulness of a refusal by the British authorities to allow the relative return of the Chagos citizens to the archipelago[18].

According to Annex VII of the UNCLOS in 2015 (Liakopoulos, 2021) an arbitral tribunal was established to deal with the dispute concerning the unilateral creation, by the United Kingdom, of a marine zone next to the Chagos Islands (Gervasi, 2019)[19]. In this case the tribunal had no jurisdiction over the

17ECtHR, 11 December 2012, Chagos Islanders v. United Kingdom, op. cit., par. 61, 74, 75, 76: "(...) first of all excluded that the declaration by which the United Kingdom had originally extended, pursuant to Art. 63 ECHR (now art. 56), the application of the Convention to the territory of the former colony of Mauritius could be considered still in force in respect of the Chagos Islands after their separation (...) questioned on the relationship between the colonial clause and Art. 12 ECHR. The applicants' argument that the jurisdictional basis provided by art. 1 would be destined to prevail over the provisions of art. 56, considered "an objectionable colonial relic" (…) anachronistic as colonial remnants may be. The meaning of Article 56 is plain on its face and it cannot be ignored merely because of a perceived need to right an injustice (…). The principles developed on extraterritorial jurisdiction in the context of the interpretation of Article 1, with particular regard to the test of effective control, could be relevant for the purposes of ascertaining the existence of its jurisdiction, despite the lack of a declaration pursuant to Article 56 (…) such a question would have ended up rendering Article 56 devoid of purpose and content (…) since Contracting States generally did, and do, exercise authority and control over their overseas territories (…) it did not consider it necessary to delve into the matter further, since the appeal was inadmissible in any case on other grounds (…)".

18Court of Appeal (Civil division), decision in case R (Hoareau and Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs, op. cit., par. 93ss.

19Permanent Court of Arbitration, judgment of 18 March 2015 in affair of: In the Matter of the Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom).

question, namely whether the United Kingdom was considered as a coastal state for the archipelago. Thus, it did not concern the interpretation of the UNCLOS in relation to the sovereignty of the land but an exception of jurisdiction ratione materiae[20].

The jurisdiction that recognized to judge the compatibility of the marine zone, as protected next to and around the island is not relevant to the Convention, which affirmed the unilateral unlawfulness of the United Kingdom to prevent fishing in the waters adjacent to the Chagos Islands, according to Art. 2, par. 3, 56, par. 2 and 194, par. 4 of the Convention as well as the related rights for Mauritius to exploit that established by the Lancaster House Agreement.

The position of the ICJ on the subject

The decision of the ICJ resulted in the adoption of Resolution n. 71/292 of 22 June 2017 (Allen, 2020; Burri, Trinidad, 2020)[21].

In particular, the ICJ rejected the objections presented and

20 Permanent Court of Arbitration, judgment on the marine protected area, cit., paragraphs 212ss and 547, letter A), no. 1.

21 The General Assembly asked the Court to answer two related questions: "(…) a) whether the process of decolonisation could be considered completed in 1968 with the acquisition of independence by Mauritius following the separation of the Chagos archipelago, in accordance with international law and in particular the obligations referred to in the Resolutions of the same Assembly 1514 (XV) of 14 December 1960, 2066 (XX) of 16 December 1965, 2232 (XXI) of 20 December 1966 and 2357 (XXII) of 19 December 1967; and (b) what were the legal consequences under international law, also in light of the aforementioned Resolutions, of maintaining the archipelago under the administration of the United Kingdom, especially with regard to the impossibility for Mauritius to implement a resettlement programme for its citizens, especially those of Chagossian origin (…)".

which concerned judicial propriety as an exercise of the relative consultative function (Puma, 2019; Polonskaya, 2019; Mccorquodale, Robinson, Peart, 2020)[22], thus stating that the process of decolonization of the non-self-governing territory of Mauritius was incomplete after the separation of the Chagos Islands archipelago in 1965[23]. The ICJ applied the principle of self-determination of colonial peoples within the light of the resolutions of the General Assembly, according to which the prohibition for the administering power follows the relative detachment by a colonial-type territory and in the absence of an expressed manifestation of will by the population concerned. In this regard, the ICJ has highlighted the idea of realizing the

22ICJ, Opinion on the Chagos Islands, op. cit., paras. 85, 86, 88, 89: "(...) in the treatment of preliminary questions. This is particularly true in relation to the issue (...) considered by many, also in light of previous case law, as the most problematic aspect of the request made by the General Assembly (...) for the purposes of the exercise of consultative jurisdiction, of the consent of the parties directly affected by the issue which is the subject of the request, given the United Kingdom's staunch opposition to the use of any Resolution procedure with respect to the dispute relating to sovereignty over the archipelago (...) without absolutely denying that the absence of a manifestation of consent by the State concerned could constitute "une raison décisive" on which to base the assessment of the appropriateness of the exercise of consultative jurisdiction (...) did not consider that in the case in question the adoption of the opinion could prejudice the integrity of its judicial function. In order to exclude that the request could imply an attempt to circumvent the principle of the consensual basis of the contentious procedure, it first of all identified the subject of the questions referred to it in the decolonisation of the non-self-governing territory of Mauritius (...) although the treatment of the question of the decolonisation of Mauritius could lead it to touch on aspects on which Mauritius and the United Kingdom had expressed divergent positions, this circumstance would not have meant that, by providing the opinion, it would have ruled on a dispute of a bilateral nature (…) the issues raised in the request, in fact, had to be framed (…) in the larger framework of decolonisation, and notably the role of the General Assembly in the matter, a framework from which they could not be dissociated (…)".

23ICJ, Opinion on the Chagos Islands, op. cit., p. 140, para. 183, lett. no. 3.

process of decolonization of Mauritius with some legal consequences.

First of all, for the United Kingdom the relative obligation to limit its administration of the Chagos Islands and for the other states was based on the erga omnes nature of obligations relating to the principle of self-determination of peoples (Bordin, 2020; Pigrau, 2020)[24] with the obligation to cooperate with the UN: "pour la mise en œuvre" of the modalities for the implementation of the decolonization process of Mauritius[25],

"(...) segnalazioniv[e] de l'Assemblée générale des Nations Unies, dans l'exercice de ses fonctions en la matière (...)"[26].

The General Assembly following the spirit of the opinion of the ICJ and the relative modalities adopted the Resolution 73/295 of 22 May 2019 accepting the same content of the judges of the ICJ. The United Kingdom has terminated the administration of the archipelago specifying that the withdrawal in an

24ICJ, Opinion on the Chagos Islands, op. cit., p. 140, para. 180: "(…) respect du droit à l'autodétermination étant une obligation erga omnes, tous les États ont un intérêt juridique à ce que ce droit soit protégé (…)".

25ICJ, Opinion on the Chagos Islands, op. cit., p. 139, para. 180: "(…) recalling the Declaration of the General Assembly on Principles of International Law concerning Friendly Relations between States (Resolution 2625 (XXV) of 24 October 1970), in so far as it affirms the duty of all States to promote " jointly with other States or separately "the realization of the principle of self-determination of peoples in conformity with the Charter of the United Nations and to assist the Organization" to acquire the responsibilities which it has to confer on the Charter in which it concerns the application of this principle (…)".

26ICJ, Opinion on the Chagos Islands, op. cit., p. 139, para. 179-181: "(…) resettlement in the archipelago of Mauritian citizens, including those of Chagossian origin, who had been deported from those territories (...) a question arises concerning the protection of the human rights of the persons concerned (...) which the General Assembly will have to examine once the process of decolonisation of Mauritius has been completed (...)".

unconditional manner and within six months means the non-invasion and the obligation for the Member States to peacefully pursue the cooperation and completion of the decolonization process of Mauritius, as a behavior to be followed in a possible manner and abstaining from any type of slowdown of the process

"(…) recognizing, or giving effect to any measure taken by or on behalf of, the "British Indian Ocean Territory" (...)"[27].

The belonging of the Chagos Islands to the territory of Mauritius as an unexpressed conclusion to the opinion of the ICJ, has referred to the integrity of the non-self-governing territory of Mauritius[28]. The General Assembly has had as a multilateral political-normative objective or better to say organizational "dans le contexte de la décolonisation" to have very incisive powers, as the International Court of Justice itself has widely recognized[29], consolidated over time well beyond the provisions of the Charter of the United Nations[30].

27ICJ, Opinion on the Chagos Islands, op. cit., p. 139, para. 6-7: "(…) Resolution diverges (…) the conduct of not making requests respectively to states and international organizations, so that the Assembly renounces to enforce in a unitary manner the obligation of non-recognition of illegitimate territorial situations (…)".

28ICJ, Opinion on the Chagos Islands, op. cit., p. 139, para. 87. See also the Minutes of the public sittings held from 13 to 19 October 2020, pp. 79ss, 90 and 153ss and the par. 178, which is affirmed that: "(...) [d]ès lors, le Royaume-Uni est tenu, dans les plus brefs délais, de mettre fin à son administration de l'archipel des Chagos, ce qui permettra à Maurice d'achever la décolonisation de son territoire dans le respect du droit des peuples à l'autodétermination (…)".

29ICJ, Opinion on the Chagos Islands, op. cit., par. 87.

30CR 2018/22, 4 September 2018, p. 41, par. 9: "(…) l'Assemblée générale décide qu'un territoire tombe sous le coup du chapitre XI de la Charte et de la Resolution 1514, ou décide de la manière dont le territoire doit être décolonisé, ses Resolutions ne sont pas de simples recommandations. Ce sont des Resolutions qui font des déterminations sur des situations pour lesquelles l'Assemblée a des

The United Kingdom has tried to attribute in a determined manner to the ICJ[31] and the General Assembly[32] the relative sovereignty for the Chagos Islands (Burri, 2019). The positions with the archipelago and under British control have not led to relative results. Already in February 2020, the United Nations Secretariat has inserted and published a geographical map with the territory of the islands of Mauritius[33]. The General Assembly has thus opened the way for considerations concerning the archipelago but also to encourage other international organizations to take positions relating to the protection of human rights and beyond (Siddique, 2021).

The topic is complex and dedicated especially after the ascertainment of the jurisdiction of the ITLOS at the maritime border between the Maldives and Mauritius. In June 2019, Mauritius presumed that the coastal state has respected the

compétences spécifiques et qui sont directement opérationnelles (…)". ICJ, North Cameroon v. United Kingdom, ICJ Reports, 1963, parr. 15, 32 is affirmed that: "(...) asserted that General Assembly Resolution 1608 (XV), which recognised the outcome of the plebiscite held in British Cameroons in 1961 (...) had definitive legal effect (…)".

31 See the declaration of 30 April 2019 which was made by Duncan the former Minister for Europe and the Americas in the UK Parliament stating that: "(…) advisory Opinion is advice provided to the United Nations General Assembly at its request; it is not a legally binding judgment. The Government has considered the content of the Opinion carefully, however we do not share the Court's approach (...) have no doubt about our sovereignty over the Chagos Archipelago, which has been under continuous British sovereignty since 1814 (…)".

32 UN Doc. A/73/PV.83, 22 May 2019, pp. 9, 25: https://digitallibrary.un.org/record/3809714?ln=en&v=pdf

33 www.un.org/geospatial/content/map-world. See also: UN Doc. A/74/834, 18 May 2020, par. 6: https://www.itlos.org/fileadmin/itlos/documents/cases/28/preliminary_objections/ITLOS_PV20_C28_5_Rev.1_E.pdf

Chagos Islands archipelago and through the arbitration proceedings against the Maldives transferred the dispute to the ITLOS based on Art. 15, par. 2 of the same statute and according to the agreement concluded between the two states on 24 September 2019[34].

On 18 December 2019 a chamber was established[35] and Maldives highlighted the five exceptions relating to the jurisdiction of the chamber and the admissibility of the application as well as the proceedings which were suspended[36]. From the exceptions only two were related to the recognition of the opinion of the ICJ and the related Resolution n. 73/295 of the General Assembly. In particular, Maldives were part of an experiment that negotiated with the parties the fixing of the maritime border obviously based on Articles 74 and 83 UNCLOS. The lack of a dispute between the parties on the determination of the border had to do with the existence of a relative abuse of process.

Maldives considered Mauritius as a coastal state that respects the archipelago and the sovereignty of the Chagos Islands. Furthermore, it relied on decisions of the ICJ to resolve the

34Special Agreement and Notification of 24 September 2019 and the Minutes of Consultation, annexed thereto.

35Judges Paik (President), Bouguetaia, Chadha, Heidar, Jesus, Pawlak (who replaced the resigning Judge Cot as of 26 August 2020) and Yanai, as well as ad hoc Judges Oxman (for the Maldives) and Schrijver (for Mauritius): see International Tribunal for the Law of the Sea, Order No. 2019/4 of 27 September 2019.

36ITLOS, Order 2019/6 of 19 December 2019.

dispute[37]. Maldives questioned Mauritius regarding the sovereignty of the United Kingdom on a final assessment of the chamber. The impediment operated in the principle of the monetary gold and the United Kingdom was a party to the binding proceedings. Its absence resulted in the lack of jurisdiction in the chamber (Pomson, 2019).

The erga omnes obligations, in a context relating to the decolonization of territories, does not go temporally with that of the history of the UN. A representation in itself hindered the application of the principle that has shown as non-self-governing territories those that in the past have been confirmed by the ICJ, in the East Timor case (Liakopoulos, 2020a)[38]. In that case, it took into account that Indonesia unlike the United Kingdom was administered by the colonial territory[39].

Maldives to resolve the dispute and the delimitation of the maritime border had to take a position on the dispute between the territorial dispute between Mauritius and the United

37ITLOS, Order 2019/6 of 19 December 2019, par. 86: "(…) according to the Maldives, despite the advisory opinion and the subsequent UNGA Resolution 73/295, the United Kingdom "maintains its claim over Chagos, which it continues to administer as the British Indian Ocean Territory (...)The Maldives states that Mauritius acknowledges this fact and that Mauritius has "reiterate[ed] its view that the ICJ Advisory Opinion 'made clear that the Chagos Archipelago is, and has always been, a part of Mauritius' (...) Thus, in the Maldives' view, it is plain that the matter of sovereignty over the Chagos Archipelago remains in dispute between Mauritius and the United Kingdom (…)".

38ICJ, judgment of 30 June 1995 in the case relating to East Timor (Portugal v. Australia), I.C.J. Reports, 1995, pp. 90 et seq.

39ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, cit., para. 88.

Kingdom regarding the sovereignty over the Chagos Islands. The dispute was limited to the jurisdiction, according to Art. 288, of the Convention on the Law of the Sea and to the extension of questions that are relevant to the interpretation and application of the same Convention. The arbitral tribunal in the marine protected area (Kunoy, 2021)[40] asked the Maldives not to call anything else into question[41]. The exceptions were based on the legal status of the Chagos Islands where the chamber had to deal[42], as a choice that had to clarify in a precise manner and at

40See in argument the judgment of 12 July 2016 relating to the case South China Sea Arbitration (Philippines v. China), case no. 2013-19, p. 184, para. 5. equally important the case from the Permanent Court of Arbitration, judgment of 21 February 2020 on preliminary objections relating to the dispute concerning the rights of the coastal State in the Black Sea, Sea of Azov, and the Kerch Strait (Ukraine v. Russian Federation), case no. 2017-06, p. 197. According to the final sentence the Special Chamber (parr. 150-151) has affirmed the case and noted that: "(…) The Special Chamber recalls at the outset that while coastal states are entitled to determine their base points for the purpose of delimitation, the Tribunal is not obliged, when called upon to delimit the maritime boundary between the parties to a dispute, to accept base points indicated by either or both of them. The Tribunal may establish its own base points, on the basis of the geographical facts of the case. Base points to be selected should be "appropriate" not only in the sense that they should be situated nearest to the area to be delimited but also in the sense that they should not result in "a judicial refashioning of geography" (Bangladesh/Myanmar, at p. 73, para. 265; Romania v. Ukraine, at p. 110, para. 149). Even at the first stage of constructing the provisional equidistance line, it is not unusual for certain features to be dismissed as base points, despite their proximity to the area to be delimited, because placing base points on them would lead to a judicial refashioning of geography (…)".

41ITLOS/PV.20/C28/2/Rev.1, Minutes of the public sittings, cit., p. 29 ss., p. 42.

42ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., para. 110, 115, 273, 288, 320, 321, 327, 345-350: "(…) exception relating to the prior negotiation required by Articles 74 and 83 of the United Nations Convention on the Law of the Sea for the purpose of initiating a contentious procedure, the Chamber, after recalling that the obligation to negotiate in good faith an agreement to define the maritime boundary constitutes an obligation of conduct and not of result (…) stated that the activation of the arbitration had been preceded by various unsuccessful attempts made by Mauritius to initiate negotiations with the Maldives to determine the respective portions of the continental shelf and delimit their exclusive economic zones (…) (the separate and dissenting opinion of ad hoc Judge

the same time to assess the impact of the determinations that are part of the ICJ opinion that respected the parties in dispute as different positions.

Rejecting some of the preliminary exceptions

The Chamber relied on the respect of the legal status of the Chagos Islands as a cornerstone of the evolution of the whole dispute. The relative impact of the proceedings concerned the maritime border between the Maldives and Mauritius[43]. The ICJ

Oxman) (…) the exception relating to the alleged non-existence of a dispute between the parties regarding the fixing of the maritime boundary. In the opinion of the Chamber, this exception is composed of two main arguments (…) there can be no dispute on the maritime delimitation until Mauritius is recognised as a coastal state with respect to the territory of the Chagos Islands (…) it had already been raised in the context of the second preliminary exception and rejected by the Chamber in the context of the examination of that exception (…) it concerns the absence of an opposition of claims concerning their marine spaces and was rejected by the Chamber in the light of the content of the legislation of the states in question, from which an overlapping of the areas that each of them considers to belong to it emerges, an overlapping which among other things had already previously led to discussions and protests in the relations between the parties (…) configurability of an abuse of procedure by Mauritius, which would have used the contentious mechanisms of the Convention on the Law of the Sea to obtain a ruling on a territorial dispute with a third state (….) the Chamber limited itself to observing that the procedural conditions and the prerequisites for the initiation of the procedure were satisfied (…)".

43ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 120: "(...) [t]he Special Chamber considers that the Chagos arbitral award is of some relevance to the legal status of the Chagos Archipelago. While the Arbitral Tribunal recognized the existence of the sovereignty dispute over the Chagos Archipelago, it was unable to address it owing to its jurisdictional limitation as an Annex VII tribunal. On the other hand, in the Special Chamber's view, the Arbitral Tribunal's findings on the rights of Mauritius in respect of the Chagos Archipelago pursuant to the legally binding undertakings of the United Kingdom, such as fishing rights in the waters of the Archipelago, the right to the return of the Archipelago when no longer needed for defence purposes, and the right to the benefit of any minerals or oil discovered in or near the Archipelago, may play a role in the assessment of whether Mauritius can be regarded as the State with an opposite or adjacent coast to the Maldives for the purpose of maritime boundary delimitation (…)".

opinion according to the Chamber had as its object the process of decolonization of Mauritius as a similar topic that had to do with the territoriality and sovereignty of an island, as elements where the Chagos Islands were in "relationship between decolonization and sovereignty"[44].

Ascertaining the unlawfulness and detachment of the Chagos Islands, as a qualification of the British administration in an archipelago, where the international wrong has the character of continuation and "unmistakable implications" for the sovereignty that asserts to the United Kingdom and the ICJ, means implicitly admitting that the exceptions are unfounded[45].

The relevant opinion was to convince the judges that the Chagos Islands were part of Mauritius as a non-self-governing territory until 1965 and as a state acquisition. The Chamber thus valued and affirmed that:

"(…) the United Kingdom, as the administering power, had the obligation to respect during the process of decolonization of Mauritius the territorial integrity of that country including the Chagos Archipelago (…) termination of the administration of the archipelago so as to allow Mauritius to complete the decolonization of its territory in a manner consistent with the right of peoples to self-determination (…) it is up to the General Assembly to indicate (…) modalities necessary for ensuring the completion of the decolonization of Mauritius (…)"[46].

44ICJ, Opinion on the Chagos Islands Case, op. cit., 118, par. 89: "(…) fait [que la Cour] puisse être amenée à se prononcer sur des questions juridiques au sujet desquelles des vues divergentes ont été exprimées par Maurice et le Royaume-Uni ne signifie pas que, en répondant à la demande, la Cour se prononce sur un différend bilatéral (...)".

45ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 173.

46ITLOS, judgment on the maritime boundary between Mauritius and the

In this way the court took into consideration the legal status of the Chagos Islands. The chamber assessed its own determinations and thus distinguished the opinions of the authorities reached by the court on questions that will have to be resolved at the international level. Thus, the chamber stated relatively that:

"(…) judicial determinations made in advisory opinions carry no less weight and authority than those in judgments because they are made with the same rigour and scrutiny by the "principal judicial organ" of the United Nations with competence in matters of international law (…)"[47].

The positions obtained were based on consultative jurisdiction without ignoring that the opinions were not endowed with binding effects as regards the legality of the conclusions reached by the court concerning the Chagos Islands:

"(…) the decolonisation process had not been fully completed at the time of the proclamation of the independence of Mauritius because of the unlawful separation of the Chagos Islands and that the United Kingdom is required to terminate its administration of the archipelago (…) therefore considering that it could not ignore these determinations in considering the legal status of the Chagos Islands (…)"[48].

The Resolution 73/295 of the General Assembly contested that the status of the Chagos Islands was seen by the General Assembly in terms of the Mauritius archipelago. The interpretation obtained was undoubtedly based on the parts that the General Assembly itself noted[49]. Even so, the situation still

Maldives, op. cit., parr. 174-175.

47ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 203.

48ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., parr. 205-206.

49See the declarations of Riffath, ITLOS/PV.20/C.28/1/Rev.1, Minutes of the public sittings, cit., p. 14.

remained complex. The Maldives according to the General Assembly constituted:

"(…) political statement not an instrument with binding force or capable of being construed as an amplification or authoritative interpretation of the Chagos Advisory Opinion (...)[50] without contesting the primarily recommendatory character of the General Assembly resolutions, it recalled the precedent of the judgment on preliminary exceptions in the case of coastal state rights in the Black Sea (…) effect of factual and legal determination made in UNGA Resolutions depends largely on their content and the conditions and context of their adoption (...)"[51].

The Chamber, in relation to the conditions that were adopted, was of the opinion that the modalities of implementation and the completion of the decolonization process of Mauritius obliged the Member States to cooperate for the UN:

"(...) modalities into effect[52] (…) general functions of the General Assembly on decolonization and the specific task of the decolonization of Mauritius with which it was entrusted (…) Resolution 73/295 assumed relevance for the purposes of assessing the status of the Chagos Islands (…)[53] making them clearer and more evident, the determinations of the ICJ[54], on the other hand it had defined, as it had been invited to do by the Court itself, through which modalities to remedy the unlawful act of the United Kingdom, which had interrupted the decolonization process of Mauritius (...) of the "modalities" for ensuring the completion of the decolonization of Mauritius pursuant to the advisory opinion (...) the groundlessness of the claims of sovereignty of the United Kingdom over the Chagos Islands, already deducible from the opinion of the International Court of Justice (…)[55] excluded that the United

50ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 217.

51ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 174 and 225.

52ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 226.

53ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 227.

54See the Resolution 73/295, which is affirmed that: "(...) [t]he Chagos Archipelago forms an integral part of the territory of Mauritius (…) the General Assembly's view of the advisory opinion (…)". ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 228.

55ITLOS, judgment on the maritime boundary between Mauritius and the

Kingdom, whose administration constitutes a continuing unlawful act, which persists despite requests from the Court and the Assembly to put an end to it as soon as possible, can be considered an indispensable party to the proceedings relating to the delimitation of the maritime border between Mauritius and the Maldives (...)[56] of sufficient elements to conclude that Mauritius can be classified as a coastal state with respect to the archipelago for the purposes of defining the maritime border with the Maldives, without having to wait for the completion of the decolonisation process (and therefore regardless of the de facto control of the archipelago by the United Kingdom) (...)"[57].

From what is noted is that the Chamber has distinguished some preliminary exceptions in a separate manner, thus, accepting the assertion that the dispute asks for, respects territorial sovereignty and resembles a dispute that has to do with the interpretation, application of the UNCLOS, according to art. 288, par. 1. In this way, the objections of the Maldives are accepted as a solution to the dispute between the United Kingdom and Mauritius, constituting a preliminary step and defining the maritime border of a dispute determined by the ICJ.

The content of the ICJ opinion on the Chagos Islands

The special chamber of the ITLOS has highlighted some notable points of investigation, given the result of the consultative function of the ICJ, which affects the rights, obligations for the parties in dispute. The consultation has turned into a binding decision (Thin, 2021). This solution therefore entails a relative

Maldives, op. cit., par. 227.

56ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 247.

57ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 250.

risk that increases the distrust among states towards the consultative jurisdiction that is based on Art. 96 of the Charter of the UN (Pazartzis, 2012; Law, 2018).

The collective dimension, that concerned the interests that were involved with the potential and situations of the consultative function of the ICJ, was not taken into account (Boisson De Chazournes, 2002). The Chagos Islands dispute was presented as a dispute that is configured through the opinion of the 2019. The chamber distinguishes the legal nature of the opinions and the questions of law (Rosenne, 1961; Weckel, 1996; Weinzierl, 2020)[58] without distinctive effect of the dispute between the United Kingdom and Mauritius in the sovereignty of archipelago[59], limiting thus Mauritius, as a coastal state that delimits itself from the maritime border.

Sovereignty remains as the basis of a jurisdiction that confers to the dispute resolution bodies, under Part XV UNCLOS

58According to Weckel: "(…) an Advisory Opinion has no binding force [...] nevertheless does not confer upon the statement of law contained in the Advisory Opinion characteristics any different from those of the statement of law contained in a judgment (…)". see also from the CJEU, sentence of 21 December 2016, case C-104/16 P, Council v. Front Polisario, ECLI:LEU:C:2016:973, published in the electronic Reports of the cases, par. 104ss. Sentence of 12 November 2019, case C-363/18, Organisation juive européenne, Vignoble Psagot Ltd v. Ministre de l'économie et des finances, ECLI:EU:C:2019:954, published in the electronic Reports of the cases, parr. 35, 48 and 56.

59ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 243: "(…) the ICJ has determined that the Chagos Archipelago is a part of the territory of Mauritius, as Mauritius argues, the continued claim of the United Kingdom to sovereignty over the Chagos Archipelago cannot be considered anything more than "a mere assertion" (…) such assertion does not prove the existence of a dispute (…)".

(Liakopoulos, 2021), to disputes that have to do with the sovereignty of the land. The advisory opinion has as its objective the existence of a right, the obligation of legitimacy or illegitimacy of a situation, where in a determined manner it shows a behavior, a definitive evaluation.

The point of controversy, to a definitive opinion, does not consider and does not indicate the opinion in the circumstances, where the divergence, thus, forms a separate instance that reappears ex novo to the court for a consultation of a further dispute and that awaits a new point of the controversy on the matter. Thus, the relative position seeks to interpret, to broaden the findings concerning the violations of obligations towards the entire international community.

In other words, the coastal state is determined and the territorial dispute between Mauritius and the United Kingdom is addressed without the ownership of the Chagos Islands.

The dispute regarding sovereignty given the refusal between the United Kingdom and its own administration, according to the ICJ and the General Assembly, involves the legal title and the factual situations that concluded.

The legal status of the Chagos Islands was “resolvable” through the respect and the reliance of some qualification determinations. The distinction, is noted through positions used by the ICJ in the opinion of 2019 and the decision under

investigation[60].

The special chamber of the ITLOS took into consideration the opinion of the ICJ. It has also enhanced the Resolution 73/925 of the General Assembly, in which the Chagos Islands will have to collaborate between the court and the assembly thus determining, integrating, strengthening the management and the consequences of an erga omnes illicit act and assuming the process of decolonization of Mauritius through the detachment of the Chagos archipelago. The General Assembly indicated the obligations that arise from an illicit act of the United Kingdom as well as identifying the forms of cooperation through the rules of the UN.

60ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 100: "(…) Parties acknowledge that their entire cases for both preliminary objections rest on the "core premise", namely that for the Maldives, the sovereignty dispute between Mauritius and the United Kingdom remains unresolved and that for Mauritius, the sovereignty issue has been resolved in its favour (…)"; Par. 165: "(…) is of the view that, given the nature of the questions posed, the ICJ did not, and could not, address the sovereignty dispute between the United Kingdom and Mauritius. On the other hand, Mauritius' view is that the ICJ stated so because "the issues raised by the request were located in the broader frame of reference of decolonization" and that, in answering the questions about the decolonization of Mauritius and its consequences, the ICJ also determined the sovereignty issue over the Chagos Archipelago (…)"; Par. 166: "(…) Special Chamber's view, the pronouncement that the General Assembly did not submit to the ICJ a bilateral dispute over sovereignty does not necessarily carry with it the inference that the advisory opinion therefore has no relevance or implication for the issue of sovereignty (…)"; Par. 167: "(…) the Maldives contends that the advisory opinion does not and cannot resolve the sovereignty dispute between Mauritius and the United Kingdom, Mauritius asserts that the advisory opinion has conclusively resolved the sovereignty issue in favour of Mauritius (…)"; Par. 168: "(…) would be contrary to the principle of consent to accept the proposition that international courts or tribunals, through contentious or advisory proceedings, can resolve a bilateral dispute without the consent of a party to the dispute (…) this does not mean that the advisory opinion could not entail implications for the disputed issue of sovereignty (…)".

The special chamber of the ITLOS did not affirm the binding nature thus limiting the authorities of the positions of the General Assembly through a general statement:

"(…) crucial role which (the General Assembly) has played in the work of the United Nations on decolonization (...)"[61].

Similarly, the related arbitration of the dispute between Ukraine and the Russian Federation in its territory, which concerned the Black Sea and the resolutions of the General Assembly, condemned the Russian annexation to the territory[62]. The determination of a judicial seat and the claims for the parties in dispute[63] have to do with a situation that did not look at the matter relating to decolonization despite the fact that the argument was used by the General Assembly. Perhaps it was used as an argument to attract in a very general way the international community also imposing on the reserved role of the assembly to take a position an argument. A similar position

61ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 226.

62Permanent Court of Arbitration, Judgment in the Case Concerning the Rights of the Coastal State in the Black Sea, op. cit., paras. 175, 189 that: "(…) the UNGA Resolutions in question are framed in hortatory language "and that" they were not adopted unanimously or by consensus but with many States abstaining or voting against them (…) in order to determine whether there is a territorial dispute capable of adversely affecting the existence of jurisdiction under the Convention on the Law of the Sea, it is necessary to assess the plausibility of the claims of sovereignty formulated by the parties (…) to have left a glimmer of hope, when it stated that it did not consider that the Russian Federation's claim of sovereignty [was] a mere assertion (…) proceedings under discussion on the interpretation of the Resolutions of the General Assembly invoked by Ukraine, it is not possible to completely exclude that, in the presence of more relevant and authoritative Resolutions, the Tribunal could instead have considered the Russian claims on Crimea as mere unfounded assertions, therefore not capable of undermining its jurisdiction (…)".

63ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 244.

that we also see being used by the special chamber and the ITLOS noting the opinion of Resolution 73/925, as can be seen from the relevant data available, the automatism and the full autonomy of an independent exercise of judicial functions, where the sentence excluded recognizing the Chagos archipelago as an integral part of the territory of Mauritius, as was also requested by the same opinion[64].

The consultative function of the ICJ has not been well assessed and the potential it could have to resolve the dispute was based on the management of consequences of violations relevant to obligations erga omnes. The ICJ has valorized the collective interest for the obligations, individual interests for the states parties to the dispute thus preventing the pronouncement of the Court to affect a legal situation, where the opinion of the Chagos Islands has shown that the judgment was based on a necessity of

64See paragraphs 6 and 7 of General Assembly Resolution 73/295. Sands' statement during the oral procedure, ITLOS/PV.20/C28/6/Rev.1, Minutes of the public sittings, cit., 166. ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit. par. 230: "(...) language of the Resolution nor the practice of the General Assembly suggests that the reference to "international, regional and intergovernmental organizations, including those established by treaty", in paragraph 7 of the Resolution, is directed to the Special Chamber or any other international court or tribunal in light of the independent exercise of their adjudicatory functions "(…) did not express an opinion on the thesis, which had also been supported by Mauritius (among other things in response to a question put to the parties in dispute by the judges themselves), according to which the resistance put forward by the Maldives to its requests for the delimitation of the maritime border, being based on the alleged need not to interfere with the United Kingdom's claims of sovereignty over the Chagos Islands, would have constituted a violation of the obligation imposed by the Resolution in question on the member states of the United Nations to abstain from any conduct likely to delay the complete decolonisation of Mauritius (...)".

daily life, that is part of the organization of the UN[65].

The consultative jurisdiction plays a very different role for the cooperation between the court and the requests of the applicants having as a final result the resolution of the dispute according to the spirit of the UN[66]. According to the General Assembly, the participating states are the weak ones and the recourse to the consultative jurisdiction of the ICJ presents indisputably the respect for the management of illicit acts and the collective importance of a diplomatic, political type. The initiative on the part of Mauritius at ITLOS has the consequence of speeding up and consolidating every tendency that seeks to resolve the dispute.

The reduction of the principle of monetary gold

The application of the principle of monetary gold to interstate disputes and the violation of collective interests is a reality that we have noted in the ICJ case and in the East Timor case that had approximately the same characteristics with the Chagos

65ITLOS, judgment on the maritime boundary between Mauritius and the Maldives, op. cit., par. 245.

66ICJ, Legal consequences of the construction of a wall in the occupied Palestinian territories hereinafter referred to as the Wall, consultative opinion, 9 July 2004, ICJ Reports 2004, pp. 136ss, par. 136. Juridical consequences for the states of the continued presence of South Africa in Namibia (South-West Africa) despite Resolution 276 (1979) of the advisory opinion, 21 June 1971, ICJ Reports 1971. The ex president of the Palau in ICJ affirmed that: "(…) responsibilities of states under international law to ensure that activities carried out under their jurisdiction or control that emit greenhouse gases do not damage other states (...)". Statement by the Honorable Johnson Toribiong, President of the Republic of Palau to the 66th regular session of the United Nations General Assembly, 22 September 2011.

Islands and the lawfulness of an exploitation of natural resources by Australia with Indonesia in the adjacent sea and the coast of East Timor. The related agreement was illegitimate in the face of a situation that had as a consequence the invasion by Indonesia to a former Portuguese colony also violating such rights to a country like Portugal, that administered East Timor including also the right of self-determination to a people.

The court applying the gold standard, thus, defined the dispute through a preliminary assessment of Indonesia's conduct and as part of a proceeding that accepted jurisdiction (Chinkin, 1996; Coffman, 1996; Klein, 1996; Scobbie, Drew, 1996, Liakopoulos, 2020a).

Portugal has tried to escape from the mentality of monetary gold and its obligation toward Australia and not to Indonesia, thus avoiding the control from the ICJ as well as the question of the lawfulness of the conduct in a direct manner from the General Assembly itself and of the Security Council as well as its own qualification as an administration to East Timor[67]. The ICJ stated that:

"(…) imposing an obligation on states not to recognize any authority over the part of Indonesia over the Territory [of East Timor] and, where the latter is concerned, to deal only with Portugal[68] (…) the resolutions referred to "went so far" (…) identified as decisive factors, on the one hand, the circumstance that several states had concluded treaties with Indonesia, which were capable of being applied also to the territory of East Timor and, on the other, the fact

67Réplique du Gouvernement de la République portugaise, vol. I, 114ss., www.icj-cij.org/public/files/case-related/84/6838.pdf .

68ICJ, East Timor (Portugal v. Australia), judgment ICJ Reports 1995, par. 31.

that the protests raised by Portugal against Australia on the occasion of the conclusion of the Treaty of 11 December 1989, although brought to the attention of the United Nations, had not provoked any reaction either from the General Assembly or from the Security Council (…) prejudice to the question whether the Resolutions under discussion could be binding in nature (...) the resolutions invoked by Portugal could not be considered (…) givens which constitute a sufficient basis for determining the dispute between the Parties (...)"[69].

The ICJ has at the time reached the conclusion that certain expressions from international bodies are competent for the claims of the third state, also considering the related data, that are acquired to make any claim superfluous for each third state with the relative result of allowing the jurisdiction the principle of monetary gold. The jurisdictional body has not assessed the legal situation of the third state and has limited the assessments of other international bodies (Akande, 2021)[70], thus stating that:

"(…) question whether the resolutions under discussion could be binding in nature (…) necessarily to produce the indicated effect such determinations must be expressed in legally binding acts (…)" (Paparinskis, 2021).

The special chamber of the ITLOS also based itself on this spirit of thought. The determinations proposed by the ICJ have clarified implications that arise from the relevant question of the possibility of considering Mauritius as a coastal state, thus

69See the dissenting opinions of judge: Weeramantry and Skubiszewski, I.C.J. Reports, 1995, pp. 154 ss, 246ss., par. 70ss.

70Akande affirms that: "(…) basis of this assumption is that if the international tribunal is simply applying a legal finding which is already binding or authoritative with respect to the third State there can be no complaint of an overreach of competence as the tribunal is not really exercising its own competence but simply accepting a reality already determined by a competent body (…)". See also the case: Larsen v. Hawaiian Kingdom, op. cit., which is affirmed in par. 11.24: "(…) well be exceptions to the Monetary Gold principle. For example, if the legal finding against an absent third party could be taken as given (for example, by reason of an authoritative decision of the Security Council on the point), the principle may well not apply (…)".

defining the maritime border and allowing the objections of the United Kingdom to be rejected during the proceedings.

In the East Timor case, the ICJ excluded the relevant reference to the resolutions that are taken into consideration by Portugal as the administering power in East Timor. This means that it imposed on the states the obligation to take into consideration only with Portugal the relevant questions that had to do with their own territory the determinations from the UN under examination. It has left many doubts and gaps open that are relevant to the question of delimitation and the maritime border between Mauritius and the Maldives

The Special Chamber did not adjudicate the claims of the United Kingdom in the sovereignty of the Chagos Islands given the unfounded nature of the acquisition of the relevant opinions of the ICJ and the General Assembly of the UN. Determinations that provide powers that respect the determination of international law to a decolonization process. The Special Chamber accepted that the Chagos Islands constitute an illicit act that continues to put an end in accordance with the spirit of the UN:

"(…) legal interests in permanently disposing of maritime zones around the Chagos Archipelago by delimitation (…) the paradoxical result to which the application of the principle of monetary gold in the East Timor affair had led: in practice, that of allowing the state which committed a serious violation of international law, with its refusal to consent to jurisdiction (...) to remove from the judgment of the latter not only itself but also any other state which supports or endorses its original illicit conduct (…)" (Coffman, 1996;

Pomson, 2019)[71].

Conclusions

The judgment in the preliminary phase had conclusions for the government of the United Kingdom both from a legal and political point of view. It is a compromise based on the opinion of the ICJ and the Resolution 73/925 of the General Assembly, which is weak. It is noted an endless story of a chain that does not conclude the proceedings in various courts super partes at international level, where the qualification of Mauritius, as a coastal state respects for the archipelago other organs, international organizations and areas of competence.

We also note the case of the Indian Ocean Tuna Commission under the FAO, where the United Kingdom has been a member since 1995. In 2019, after the adoption of the opinion of the ICJ, Mauritius highlighted the permanent role of the United Kingdom in the organization. The ITLOS, through the qualification of the Chagos Islands as a coastal state, made the participation of the United Kingdom precarious. The judgment was capable of bringing to implications the rules of the law of the sea. The special chamber of the ITLOS enhanced the opinion of the ICJ, also taking inspiration from the ECtHR. Perhaps we also see ex novo the R (Hoareau and Bancoult) v. Secretary of

71 Coffman affirmed that: "(…) allows the primary miscreant state's refusal to consent to jurisdiction to spread a network of "vetoes", vitiating the consent to jurisdiction of any other state which may have helped it (…)".

State for Foreign and Commonwealth Affairs (Monaghan, 2021) case[72].

Within this framework, the non-applicability of the ECHR as a formulation of the declaration that provided for the colonial clause is overcome and the qualification by organs of the UN, the British administration, the self-determination of peoples has refused to found other clarifications from the UN, such as recognition of a coastal state according to the delimitation of marine spaces around the archipelago, admitting that the United Kingdom can be the state responsible for the external relations of the Chagos Islands according to Art. 56 ECHR (Villiger, 2023).

For Mauritius, the reasoning of international law instruments to a logic of fait accompli with a determined manner on the part of the United Kingdom was not successful and did not promise anything. International organizations have distanced themselves from the British positions. For example, the declaration of the Chagos Islands archipelago with the British Indian Ocean Territory, adopted on 1 June 2021, has been noted by the European union. In fact, the European Union highlighted that the British Indian Ocean Territory according to art. 774, of the agreement on trade with the United Kingdom of 30 December

72https://www.landmarkchambers.co.uk/news-and-cases/r-hoareau-and-bancoult-v-secretary-of-state-for-foreign-commonwealth-affairs-2019-ewhc-221-admin-resettlement-of-the-Chagos-islands.

2020 has:

"(…) interpreted and implemented in full compliance with applicable international law (...)"[73].

The congress of the universal postal union from August 2021 also stated that:

"(…) the purposes of the activities of the Union, the Chagos Archipelago forms an integral part of Mauritius (…)" (Gruenbaum, 2021).

The special chamber of the ITLOS on 28 April 2023[74], issued a judgment in relation to the dispute. What interests us are the final conclusions, where the Court established and determined the relative delimitation of the continental shelf beyond 200 nm (Tanaka, 2023), as an admissible basis. Thus Mauritius requested that the maritime boundary between the Maldives and Mauritius will now be declared according to the rules of the UNCLOS within 200 nm[75] and an external continental shelf that will be included within 57 points[76].

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73 Union declaration on Chagos Archipelago/British Indian Ocean Territory. ST/8460/2021/INIT. OJ L 192, 1.6.2021, p. 1-1.

74 https://www.itlos.org/fileadmin/itlos/documents/cases/28/Merits_Judgment/C28_Judgment_28.04.2023_orig.pdf

75 According to judge Nicolaas J. Schrijver in par. 13 of his declaration as judge ad hoc declared: "(...) in order "to achieve an equitable solution" as stipulated in paragraphs 1 of articles 74 (exclusive economic zone) and 83 (continental shelf) of the Convention, the Special Chamber returned to the question of the potential impact of Blenheim Reef on the delimitation of the maritime boundary between Mauritius and the Maldives. In the opinion of the Special Chamber, ignoring Blenheim Reef completely "would not lead to an equitable solution in the present case, given the presence of extensive areas of drying reefs as shown by the geodetic survey carried out by Mauritius" (paragraph 245 of the Judgment). Therefore, the Special Chamber decided that, in light of the geographical circumstances in the present case, Blenheim Reef constitutes a relevant circumstance and that the adjustment of the provisional equidistance line in stage 2 should give half effect to Blenheim Reef (paragraph 247) (…)".

76 The Special Chamber in final sentence of 28 April 2023: "(…) will address whether Blenheim Reef is a single low-tide elevation, as Mauritius asserts, or consists

Maldives asked the special chamber to declare and reject what was asked by Mauritius. The special chamber by ultra vires leaned towards Maldives and rejected the position of Mauritius. And regarding EEZ[77] Maldives asked for the delimitation of a maritime border connected through point 46 and 47[78]. In this point too the path of Maldives was followed.

The Special Chamber followed the three-step path to arrive at an equitable solution according to Articles 74, 83 UNCLOS and what has been pre-established by the ICJ in the same dispute through article 38 regarding equitable solutions that do not have a relative guide that affects and that leaves to each state and to

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of 57 low-tide elevations, many of which are situated beyond 12 nm from the nearest island, Île Takamaka, as the Maldives asserts. Related to this question is whether, in drawing archipelagic baselines in accordance with article 47, paragraph 1, of the Convention, the requirements set out in paragraph 4 of the same article should be applied. The Special Chamber also notes that the third question may be relevant in determining the exact location of the base points if Blenheim Reef can be an appropriate site of base points (…)".

77 Special Chamber of ITLOS, final sentence of 28 April 2023, par. 323: "(…) Mauritius contends that "[a]t no point in time have the Parties been less comprehensive as to the scope of their claims or of the dispute itself", that "[a]t no time have the exchanges referred to any limit of the discussions to areas within 200 M", and that "in its Notification and Statement of Claim initiating these proceedings, Mauritius defined the 'subject matter of the dispute' as 'the delimitation of the Exclusive Economic Zone (…) and continental shelf of Mauritius with Maldives in the Indian Ocean'." According to Mauritius, from the outset, "the subject matter of the dispute was thus defined in the most comprehensive terms" as being "an integral part of the delimitation dispute between the Parties (…)".

78 According to the final sentence of the slecial Chamber in 28 April 2023: "(…) Article 47(1) of UNCLOS, only those LTEs "situated wholly or partly" within 12 nm of the nearest island (Île Takamaka) could be used (…) found that Blenheim Reef was a "relevant circumstance requiring adjustment of the provisional equidistance line (…) ignoring Blenheim Reef completely would not lead to an equitable solution", given the "extensive areas of drying reefs" forming part of the Chagos Archipelago. The Special Chamber found "no significant disproportion" between the ratio of the relevant coasts' lengths and the ratio of areas allocated to each party (…)".

the Court itself to decide in a useful way for each case that presents the relevant facts and the positions of the participating parties as a standard method to resolve disputes and especially as in our case that a solution is requested after 58 years.

In the case of maritime boundary delimitations involving neighbouring states such as Bangladesh v. India, Ghana v. Ivory Coast and Somalia v. Kenya, the method of first drawing the temporary line as a basic measure for the two parties has been followed, thus leading to the relative modifications that are necessary for the circumstances that approve the line of a boundary, as a conclusion that does not end with a proportional manner between the parties involved and third parties who have not participated. This is a basis that shows transparency but also other disputes perhaps for the near future by third parties.

The special chamber has taken a position declaring that it has no jurisdiction and that it cannot accept the position of Mauritius for the delimitation of continental shelves beyond 200 nautical miles[79]. The court based itself on the fact that Mauritius could

79Final sentence of 28 April 2023 from the Special Chamber of ITLOS, parr. 277-278: The Special Chamber notes at the outset the Maldives' contention that Mauritius' claim of entitlement to the continental shelf beyond 200 nm is neither within the Special Chamber's jurisdiction nor admissible. In this regard, the Maldives raises four objections to the jurisdiction of the Special Chamber and the admissibility of Mauritius' claim. First, the Maldives argues that Mauritius' claim of entitlement to the continental shelf beyond 200 nm in the Northern Chagos Archipelago Region is outside the Special Chamber's jurisdiction because no dispute as regards such entitlement existed at the time Mauritius filed its Notification. Second, the Maldives contends that Mauritius' claim is inadmissible because it has failed to make a timely CLCS submission regarding the Northern Chagos Archipelago Region. Third, the Maldives asserts that Mauritius' claim is manifestly unfounded under article 76 of the

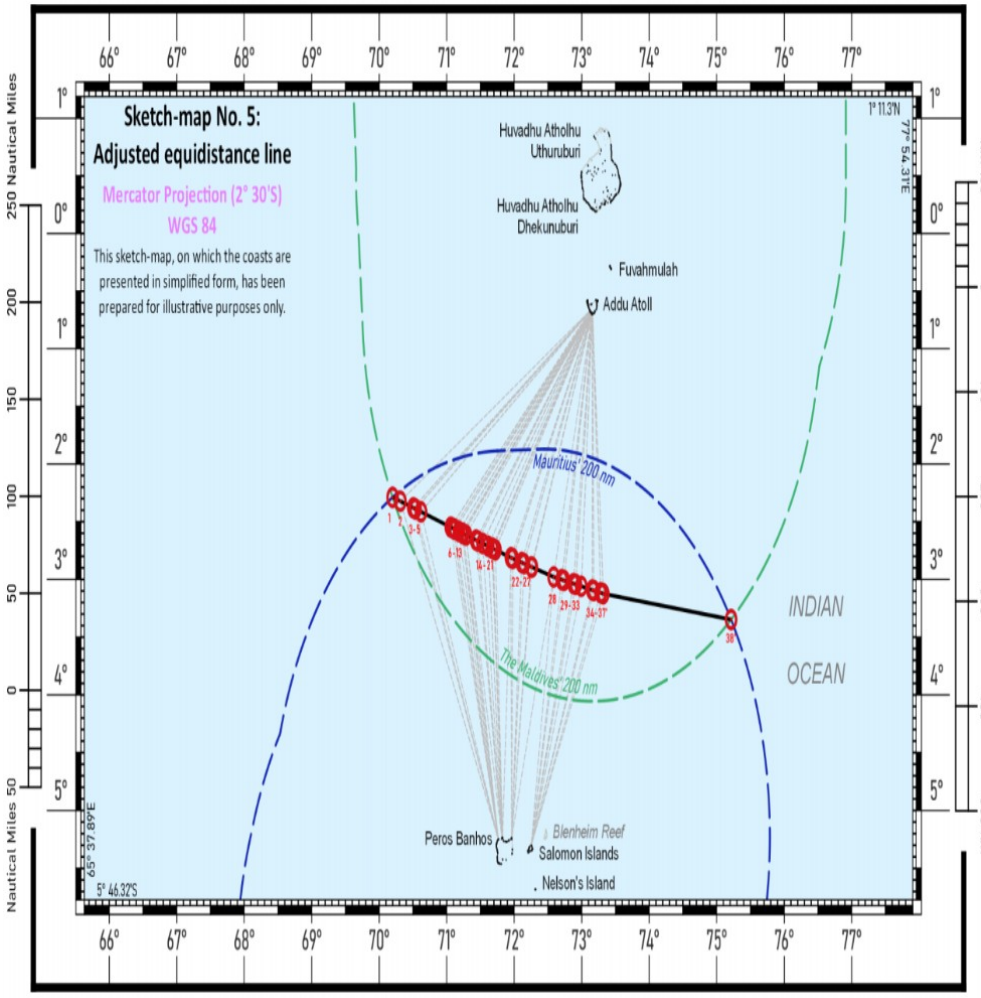
not sufficiently establish the area of the claimed claims. This is an uncertain position because Mauritius could not naturally establish the land territory through a continental shelf of the Maldives within 200 nm[80] without being contested[81].

Convention and is therefore inadmissible. Fourth, the Maldives submits that Mauritius' claim that the area of overlap with respect to the continental shelf beyond 200 nm should be delimited by dividing it in half is predicated on a prior delineation of the outer limits of the continental shelf, a task which, according to the Maldives, is beyond the jurisdiction of the Special Chamber, and is thus inadmissible (…); Par. 278 (…) Mauritius argues that each of the Maldives' objections is without merit and should be rejected. Mauritius submits that the Special Chamber has jurisdiction to proceed with the delimitation of the maritime boundary between the Parties, both within and beyond 200 nm, and that its claim to a continental shelf beyond 200 nm is fully admissible. Mauritius maintains that in the circumstances of the present case, the equitable solution required by article 83 of the Convention is satisfied by "an equal apportionment of the area of overlapping entitlements.

80 See also the declaration of President-Judge Jin-Hyun Paik in relation to the final sentence of 28 April 2023, which is affirmed: "(…) caution against reading these paragraphs as implying that an international court or tribunal should necessarily refrain from proceeding to delimitation if there is a disagreement between the parties as to their entitlements to the continental shelf beyond 200 nm. The function of an international court or tribunal is to give an authoritative ruling on any disagreements between the parties, including a disagreement on the scientific aspects put forth in support of entitlement to the continental shelf beyond 200 nm. Therefore, the test to be applied for the exercise of restraint is not whether there is a disagreement between the parties but rather whether there is "significant uncertainty" about the existence of such an entitlement which may arise from the competing scientific points of view between the parties (…)". Judge Tomas Heidar declared in par. 16: As far as delineation is concerned, the CLCS has adopted, as an initial step, the test of appurtenance (paragraph 2.2 of its Scientific and Technical Guidelines), which the coastal state must satisfy. If a coastal state is able to demonstrate to the Commission that the natural prolongation of its submerged land territory to the outer edge of its continental margin extends beyond the 200 nm distance criterion, the outer limit of its continental shelf can be delineated by applying the set of rules described in paragraphs 4 to 10 of article 76 of the Convention. If, on the other hand, a coastal state is unable to demonstrate the above, the outer limit of its continental shelf is automatically delineated up to the 200 nm distance (…)".

81 https://essexcourt.com/maritime-boundary-decision-between-Mauritius-and-the-Maldives/

Map 2:Adjusted equidistance line



Source:ICJ

Regarding the other lines that will have to be drawn as a delimitation from Mauritius, the slope still continues because the topic is complex and with various uncertainties. Mauritius if it wins this requested position will have points established in a pre-established manner and based on three phases as a solution method. A method that needs certainty with a mathematical method, precise without leading to other disproportions in the subject[82].

Mauritius does not have precise and transparent positions, therefore, the arguments brought are ultimately rejected, or rather they have remained without a desired solution.

The arguments are addressed according to what is pre-established by the previous ruling of both the ICJ, as well as of the Special Chamber itself and the related exceptions that

82According to par. 160 of the final sentence of 28 April 2023 from the special Chamber of ITLOS: "(…) In response to the Maldives' contention that Mauritius has not met the requirement of article 47, paragraph 3, of the Convention, that the "drawing of such [archipelagic] baselines shall not depart to any appreciable extent from the general configuration of the archipelago", Mauritius argues that there is no requirement for archipelagic baselines to encompass "all" the islands of an archipelago. According to Mauritius, what article 47, paragraph 1, says is only that the "main islands" may not be excluded, and in Mauritius' case they have not been excluded. In this regard, it asserts that Nelson's Island, which was excluded from its archipelagic baselines, is not a "main island", given its size and the lack of any record of human habitation thereon. Mauritius provides four concrete examples of recognized archipelagic states that exclude certain islands, which are significantly larger than Nelson's Island, from their archipelagic baselines. In all four cases, Mauritius points out, the United States concluded that the archipelagic baselines do "not appear to depart to any appreciable extent from the general configuration of the archipelago." It notes in this regard that the Maldives appears to be the only State to have objected to Mauritius' baselines "on the merits." Mauritius also refutes the Maldives' argument that archipelagic baselines drawn by Mauritius are invalid because three archipelagic base points are beyond 12 nm of Île Takamaka (...)".

responded in the year 2021. The arguments for Mauritius still continue to be open and above all the topic concerning the citizens deported from the Chagos Islands, which also include an aspect not so much of an international dispute but of a criminal nature that perhaps will be addressed in the coming years by another court.

As for the method used as well as the principles of equidistance and the continental shelf in 200 miles we can say that a general line has been followed that up to now is also held in previous cases both by ITLOS as well as by the ICJ, always based on the rules of UNCLOS. The methodology used according to the declarations of the judge allow us to say and talk about rights erga omnes used but also about arguments that are not yet closed, showing that the history of the Chagos Islands will perhaps continue for the next few years, but by other courts this time and with which other arguments used as a weapon to resolve a historical dispute.

The Special Chamber has not seen to take an exact, precise position also from the general point of view regarding the consequences of erga omnes illicit acts both with regard to a decolonization discourse but also with regard to the delimitation, thus, referring in a deficient way to a final reconstruction as a choice of recognition of rights already recognized both by the Charter and the practice of the UN, as well as by the UNCLOS.

Already on the subject the International Law Commission (ILC) has not excluded the principle of lex specialis as it has been codified through Art. 55 of the project on the responsibility of states, which operated on the respect of the regime of responsibility towards the international community. Thus, the Special Chamber as well as the ICJ has not dealt with some rights that have been taken for granted, for example the right to self-determination and violations of norms that are the result of erga omnes obligations.

Conclusively, the relative silence of a minimalist type has been followed by the Court, thus, identifying relative legal effects that are part of the collectivity of states and in diversity of a regime that applies in situations, where the relationships between norms of international law and the law of the sea, will have to be explored perhaps outside of the consultative judicial positions with the possibility of regulating and avoiding liability arising from serious violations of rights erga omnes.

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